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IN MEMORIAM: DAVID P. CURRIE (1936–2007)

Gerhard Casper[†]

My correspondence file with David is rather slender. The first item (after we had been colleagues for more than twelve years) is a handwritten note from him following my remarks at the Annual Dinner of The University of Chicago Law School Alumni Association on April 19, 1979. I had become dean of the law school on January 1st and this was the first occasion at which I addressed the alumni. I had used my speech to express my concerns about the “anything goes” approach to legal scholarship and asked that legal scholars be fair and clear about where their own preferences come into play. Somewhat contrary to the evidence, I had stated that neither law nor its history can be infinitely manipulated to suit our own views.

It will surprise nobody that David rather liked these sentiments and thought that they “needed expressing.” Since David was no flatterer, his generous compliments about my talk (he thought it was “elegant” and had just the right mix of humor and serious stuff) were a great morale booster for the new dean about whom it could hardly be said that he knew what he was doing.

So, how did David and I communicate in the twelve years before I became dean and in the subsequent fourteen years before I left The University of Chicago for Stanford? First of all, of course, we communicated by following Chicago’s hallowed tradition of visiting one another in our offices. Since David, when at The Law School, was somewhat more sedentary than I, there were probably more visits from the

[†] President Emeritus, Stanford University.

fifth floor to the fourth than the other way around. Also, I needed his insights more than he needed mine.

Secondly, in that other great Chicago tradition, we read one another's manuscripts and critiqued them in the uninhibited and robust manner that was (and, I presume, is) the hallmark of The Law School. On the return of a draft, comments in the margin might say that an important and clever point one had made was "nonsense" or "indefensible." David's language was usually gentler than that but in substance no less devastating. The Law School, in its inimitable manner, was a *truly* "supportive environment": it took its faculty and students seriously and had high expectations for them. David certainly did.

Thirdly, as far as I can remember, David "took" at least two of my courses. He, the master teacher, never thought of himself as too good for sitting in on somebody else's class. One of these courses was on the history of the separation of powers in the founding period and the other on comparative constitutional law. His dedication to me of his book on German constitutional law read, in German, "Without you this book would never have been written."

That book, incidentally, used as its motto, a quotation from Thomas Mann's novel *Joseph in Egypt*: "For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be."

The motto was a perfect expression of David's love of learning that did not shy away from doing the hard thing (like studying German and becoming fluent in it) so that he would not be a dilettante. The Thomas Mann quotation is also indicative of David's love for literature. He would always ask me for reading suggestions. And, of course, his curiosity made him travel widely and made him teach abroad. My correspondence file includes the occasional postcard.

Among David's areas of scholarship were conflicts and federal jurisdiction. I had little interest in conflicts but, as somebody teaching constitutional law, was, of course, concerned with federal jurisdiction. Our true common interest, however, was the work of his later years on the Constitution in the Supreme Court and in Congress and the comparison of United States and German constitutional law.

David's two volumes on the Constitution in the Supreme Court (1789–1888 and 1888–1986) have become every conscientious lawyer's main reference books when he or she wants to understand how a Supreme Court case related to the law of the land at the time of decision. David analyzed and criticized the justices' work from a lawyer's point of view. He strongly believed that judges have no more right to invent limitations not found in the Constitution than to disregard those put there by the Framers. At the time the first volume was published (1985), this was not any longer, to say the least, a widely shared view

among teachers of constitutional law. His books were sustained critical accomplishments.

David, the subtle lawyer that he was, understood, of course, that there is no single lawyer's point of view and, more importantly, that when the Constitution emerged from Philadelphia it set forth only the great outlines of our system of government. Yet, there was something fearless and "fundamentalist" about David's approach that led him to question even generally accepted wisdom and, importantly, to do so against his own political preferences. David was the rare law professor whose legal opinions and political preferences frequently did not coincide. I remember occasions when I turned to David because my legal intuitions were not in accord with the consensus of the professoriate and I would ask him: "David, what is wrong with me?" Occasionally, he would comfort me by saying: "There is nothing wrong with *you*."

The second volume of his Supreme Court history sums up how David saw the Court's record of judicial review. A number of his judgments were hardly fashionable and he was not impressed by what the Court did and did not do to prevent other branches from exceeding their authority.

When Congress effectively reduced the Southern states to colonies after the Civil War, the judges lacked the audacity to intervene. When Congress in the 1930s assumed extensive powers the Constitution had apparently reserved to the states, the Court was intimidated into submission. When freedom of expression was endangered by popular hysteria during the First World War, the Court went along without a murmur; when the problem recurred after the Second World War, it protested cautiously and then withdrew from the field. The Justices dragged their feet in ordering desegregation in the face of popular opposition and ran from the opportunity to stand up for congressional prerogatives during the Vietnam War. Even favorable decisions of the Supreme Court failed to effectuate the voting rights of blacks until other branches of the federal government finally added their weight to the scale.¹

David was also concerned that the Court on occasions so exercised its power of judicial review as to deprive the people of what seemed the legitimate fruits of the democratic process. One example he gave was the Court's use of the due process clause against congressional efforts to ameliorate social ills during the Great Depression.

¹ David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986* 91–92 (Chicago 1990).

After completion of the magisterial Supreme Court project, it was, perhaps, a natural step for David to look at constitutional interpretation by the other branches, especially since, before 1800, nearly all of our constitutional law was made by Congress or the President. At the time of his death, David's vast historical undertaking had produced four volumes on the Constitution in Congress. The book on the Federalist Period is the most systematic and analytic treatment of the gloss that the early Congresses wrote on the Constitution. His subsequent volumes are more or less the *only* systematic treatment of the manner in which Congresses have expounded the Constitution. That some looked at his endeavor with bewilderment did not bother David. David was arguably the most "inner-directed" colleague and friend I have had.

After graduating from Harvard Law School, David clerked for Henry Friendly (he was Judge Friendly's first appellate law clerk) and then for Felix Frankfurter. Much later, I served with Judge Friendly on the Council of the American Law Institute. I recall a train ride, after a Council meeting, that Friendly and I shared to New York City, during which we talked, among other things, about David. It was my impression, recently confirmed by another Friendly clerk, that in the long list of exceptionally distinguished clerks whom Friendly was able to attract, David remained his favorite. And Friendly certainly was David's favorite federal judge about whom he said that he "loved him." In 1984, David wrote about Judge Friendly that in his integrity, his intelligence, his thoroughness, and his humanity Henry Friendly was the true embodiment of a judge.

In *his* integrity, intelligence, thoroughness, and humanity, for forty-five years, David was the true embodiment of a law teacher, law scholar, colleague, and friend. To the extent to which the lot of human beings allows, David became "all that he was meant to be" and our love for him will last.

Richard A. Epstein[†]

I am truly honored to speak at this occasion as a representative of The Law School faculty about the life of David P. Currie. The formal elements of his career are easy to state. David was a man of simple tastes and immense loyalty. David went to The University of Chicago as an undergraduate and then straight to Harvard Law School. I was not here when he arrived to join the faculty in the fall of 1962 after clerkships with Henry Friendly of the Second Circuit and Felix Frankfurter of the United States Supreme Court, both of whom did so much to shape David's judicial philosophy. But I have no doubt that from that first day forward, David thought himself a member of The University of Chicago faculty for life. He knew that he had found an intellectual home, and to him that was all that really mattered.

David was truly incorruptible. He was a man who marched very much to his own drummer. He cared little about the adulation and the attention that he might receive from the world. I do not think that he ever did a day of work as a legal consultant, either for a private client or for some public interest group. I doubt very much that he ever wrote a single op-ed. David always thought that any outside connection would lead him to tilt his views in one direction or another. He prized above all his academic independence. He was more gregarious than Greta Garbo, but I am sure he said to himself on more than one occasion: "I want to be alone." And so he was, with his endless sources and his mammoth projects.

David was rigorous, ambitious, and encyclopedic in his academic work. He had a prodigious appetite to read and master all the primary sources. Often I would wander into David's office. Before him were several volumes of the Supreme Court reporters or the Congressional Record. First with his yellow note pads and later his computer, he organized this vast store of material. But there was an untroubled serenity about his work. Nothing was out of place. Nothing was hurried. All seemed to be in control. With vast dedication and iron discipline David would work his way through his material with ease and determination. Excellence and precision in all that he wrought were what he prized most. He was his own greatest supporter, and his own most severe critic. His clarity of mind and his persistence of purpose were unmatched by anyone whom I have ever met. It was just that personal fortitude and

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boundless self-reliance that allowed David to battle so valiantly to overcome illnesses that would have soon laid low lesser mortals.

David was a man of broad interests. He could, and he did, teach common law subjects like contracts and property. He could, and he did, do extensive work on the law of pollution after his term of office for the Illinois Air Pollution Control Board. And he of course did wonderful work in the area of conflicts of law, in which his father Brainerd was such a pioneering figure. But David's true love was constitutional law as seen through the lens of constitutional history. His two great volumes on the United States Supreme Court tell the tale of its major cases from 1789 to 1986. They form a great intellectual achievement that will be the standard reference work on this period for generations to come. As fate would have it, I was in fact reading his first volume when Barbara called me on the phone to ask me to speak at this event. His magisterial work on the Constitution in Congress will, I fear, never be finished. Who could summon the energy and knowledge to do that work?

David was a man who did not go in for high theory, and he had little patience with the fads and fancies of modern constitutional law. His work has a solidity and a reliability that is matched by few others. Most scholars when they approach the Constitution—and I plead guilty to this charge—have strong intellectual precommitments that lead them one way or the other. Not David. He checked his politics at the door. In his view the Constitution was never an empty vessel into which people could pour their favorite preconceptions of what the Constitution said or what the Supreme Court should do. He was the Sergeant Joe Friday who wanted “just the facts, ma’am.” His calling card was fierce accuracy coupled with careful legal analysis. I doubt anyone else has ever had so complete a command of primary and secondary sources, or known how to synthesize a vast storehouse of knowledge into prose that was both clear and precise.

Yet with all these strengths, David was never one-dimensional. Others can speak of him as an inspiring teacher. Let me relate two brief stories in David's unnatural role as interim dean. We were both in Orlando for a two-day conference organized by the American Association of Law Schools. David spent the first day doing his decanal work, and I recall asking him what he planned to do the second day. That was easy. One day for the school, and one day for David. He had rented a car, gotten a map, knew where all the best birds were likely to be found, and he was off, alone but content, on his own to do his own thing, such was his level of self-sufficiency. Work meant a lot to David, but so did birds.

On other occasions David could speak with a directness that could easily lead the uninitiated to be taken aback. If David had

something to say he said it, let the chips fall where they may. Just yesterday I ran into a former member of our faculty, Jack Goldsmith. I mentioned that I was going to speak at David's memorial, and a sad and wistful smile crossed his face. He related to me the story of when he first met David.

He had just finished his faculty job talk at Chicago and was ushered to meet the dean in what he thought would be a relaxing session devoted to pleasantries and good cheer. But not so. Our interim dean was then one David Currie. David had open in front him Jack's law school note on conflicts of law, with many passages highlighted in yellow, and the first question out of his mouth was: "Now don't you think that you were a bit unfair to my father?" David was all business. Jack does not quite remember what he answered, but he does remember that from this rocky start the conversation showed David at his personal best, with a warmth and toughness that showed how much he truly cared about his work and the people he worked with.

And so it was. David was one who always gave more than he got. He did so for his family. He did so for his music. He did so for his students and his colleagues. He gave generously to all, knowing that from his generosity he gained as well. His passing closes a chapter in the life of the Law School, to which he gave so much and from which he asked so little. They broke the mold after they made David. Barbara and all the Currie clan know that I speak the truth when I say that I doubt very much that we shall ever see his like again.



When I think of Professor Currie—and even a decade after graduating from The Law School I could not bring myself to call him anything but *Professor Currie*—the first thing that comes to mind is that twinkle he almost always had in his eye. I was a student of Professor Currie’s in the mid-1990s; I am also one of the three co-founders of *The Green Bag*, the so-called “Entertaining Journal of Law,” of which Professor Currie was an immense supporter. I was honored to be invited to share a few words about Professor Currie from both of these perspectives—and in particular, to discuss how that twinkle has made such a difference in my life and the lives of many others.

As a teacher, Professor Currie’s talents are truly legendary. He was amazingly—shockingly—good at inspiring his students. It was in his Civil Procedure class, during the first week of law school, that I decided I had not erred in giving up graduate school and going to law school. It’s hard to put my finger on exactly why. I think it was a combination of his evident love for the law, his deep intellectual curiosity, and his unerring ability to see through the holes in an argument—and to point them out. And boy would he point them out—though always kindly. He was never one to make the mistake of confusing the *student* with the student’s *argument*.

That’s not to say that Professor Currie suffered foolish arguments kindly, though. One of the memories from law school that has stuck with me most strongly, and which continues to affect me on a day-to-day basis even now, thirteen years later, was again in that 1L Civil Procedure class. We’d spent the entire period talking about the relationship between summary judgment and the Seventh Amendment right to jury trial, and the class period was almost over. Professor Currie had just about convinced all of us that summary judgment was an unconstitutional violation of the right to trial by jury, but then he turned around—literally and figuratively, as was his wont—and noted that this just couldn’t be right. He asked the class why, and I, young pip-squeak that I was, volunteered. I was sure I knew the answer, and gave one—which was manifestly wrong. It was one of the few times that I saw that glint leave Professor Currie’s eye. I had disappointed him; *he*

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was going to have to explain the point before we ran out of time and spent the weekend thinking that summary judgment was unconstitutional. I still feel bad about letting him down, thirteen years later. And I still remember that look every time I catch myself about to speak without thinking my answer through. And, much of the time—well, at least some of the time—I catch myself, and think further before speaking. I wouldn't want to disappoint Professor Currie.

In addition to classes with Professor Currie, my other main contact with him has been through *The Green Bag*. The *Bag* was started by three students in the class of 1997, shortly after we graduated. We were tired of endlessly long law review articles and wanted to publish shorter, interesting, well written pieces of legal scholarship—the kinds of things Professor Currie wrote regularly. There had been a law journal at the end of the nineteenth century called *The Green Bag* that specialized in this sort of work, and we thought we could, perhaps, recreate it at the end of the twentieth century.

Well, we just published our 40th issue—Volume 10, Number 4. And not a single issue of the *Bag* would exist were it not for Professor Currie. When Ross Davies, Monty Kosma, and I had this crazy idea, we started going around to talk to faculty at The Law School to seek their input and support for it. There are many people on the faculty who were amazingly supportive—it probably took us five years before we first published an issue without at least one piece from a member of the Law School's faculty—but I hope no one will be hurt by my acknowledging that Professor Currie was truly the star. Not only did he write the introductory article for *The Green Bag*—Volume 1, Number 1, page 1—and many, many other pieces over the years. (I counted, and he published nineteen separate articles in the *Bag*.) Equally important, he gave us his blessing, he gave us his support, he gave us his counsel, he lent us his name, and . . . he convinced us that this was something worth doing. The three of us could never repay him that debt. And *The Green Bag's* readers, too—law professors, judges, lawyers, and lay people nationwide—also owe him a deep debt for that.

So Professor Currie, I thank you for everything you've done for me, for other students who have been privileged to sit in your classroom over a forty-five-year period, for everyone who has been touched by your scholarship, your brilliance, and your charm. I feel sorry for all the future law school students who will never get the chance to experience that twinkle in your eye. David, I'll miss you.

Herma Hill Kay[†]

David Currie and Roger Cramton brought out their casebook on Conflict of Laws in 1968, and I immediately began using it in my course at Berkeley. I didn't know David, but I had taken Civil Procedure from Roger and Conflicts from David's father, Brainerd Currie, at Chicago. I was convinced that Brainerd's revolutionary approach to choice of law—governmental interest analysis—offered the most constructive way of thinking about that intractable problem. Since the Cramton and Currie book focused on that approach, I was delighted with it.

In 1974, David and Roger asked me to come in with them as a co-author on the second edition. Although I was already hard at work with Ruth Bader Ginsburg and Kenneth Davidson on our casebook about sex-based discrimination, I was happy to accept their invitation. It was during our collaboration on the second edition, which was published in 1975, that I got to know David and appreciate the subtlety of his mind.

The collaboration of law professors on casebooks may be unique to legal education. These books are not scholarly texts, nor are they simply collections of teaching materials. The best of them—Hart and Wechsler's 1953 casebook, *The Federal Courts and the Federal System*, comes to mind—shape the intellectual understanding of a particular field for many years. In such cases, the coauthors are specialists in the subject matter and have published law review articles about it. Typically, they also teach the course and in the process are exposed to and learn from their students' questions and insights about the material. Obviously, the collaboration is facilitated if the coauthors share a common approach to the subject. This was true in our case. Unlike some other editorial teams, we did not meet in person. When the second edition came out, we were spread across the country: Roger at Cornell, David at Chicago, I at Berkeley. Neither the fax machine nor email was commercially available, so we communicated by mail and (rarely) by telephone. There was nothing particularly innovative about our method of preparing the new edition. We divided up the work (I drew the chapters on choice of law theory and family law), produced drafts, sent them to each other for suggestions and comments, revised the drafts, and agreed on a final version.

[†] Barbara Nachtrieb Armstrong Professor of Law, UC Berkeley School of Law. BA 1956, Southern Methodist University; JD 1959, The University of Chicago.

It was in this ordinary process of revision that David's clarity of thought and talent for organization stood out. His editorial philosophy, shared by Roger, was stated up front in the Preface:

In general, we have reprinted cases rather fully in a desire to provide class material that retains the texture and diversity of the original. We have not carried this approach so far, however, as to preserve passages that are repetitious or irrelevant. Authorities cited in principal cases have been ruthlessly pruned; only those citations that build an understanding of the course as a whole or that a curious student might want to examine have been preserved.¹

I transgressed this demanding standard more than once, particularly in working on the family law cases in Chapter Six, where my experience in teaching that subject indicated that the facts often influenced the outcome even of interstate child custody cases. David muttered about whether these cases had to include so many factual details. But I persevered, and he was willing to be tolerant. Over the years, Chapter Six has increased in importance (and in length) with the successive Uniform Acts, congressional legislation, and emergence of the knotty conflict of laws problems raised by same-sex relationships.

Through the many revisions of our casebook, and with the addition of two new coauthors, Dean Larry Kramer (on the fifth edition in 1993) and Professor Kermit Roosevelt III (on the seventh edition in 2006), I have tried to keep David's preference for a lean and concise book in mind. He was an excellent coauthor, and I learned much by working with him. His understated manner did not disguise the penetrating quality of his analysis. His many important contributions to legal scholarship in general, and not only to our casebook, will keep his memory bright for generations to come.

¹ Roger C. Cramton and David P. Currie, *Conflict of Laws: Cases—Comments—Questions* xiii (West 1968).

Edmund W. Kitch†

I joined The University of Chicago faculty of law in the summer of 1965. David was already there, having joined in 1962. The faculty was small, hiring infrequent, and faculty once hired usually remained for the duration of their careers. David became my academic older brother, although I would not have thought about it that way at the time. It was a good thing he did, because there was no other likely candidate. David's style was to lead by example not by exhortation. This essay is an account of what I learned from him.

In retrospect, it is clear to me that David came to The Law School with settled views of both law and the role of the legal scholar. I will call these views his jurisprudence, although he would have been uneasy with the term. He himself never undertook to articulate his views at length. In the introduction to his *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, he says: "I shall not stop to justify these convictions. As a colleague of mine recently remarked, 'scholars who spend too much time debating how to conduct a discourse may never be able to say anything' at all. My aim is not to defend the rule of law but to apply its methodology to the cases."¹

A striking aspect of David's jurisprudence is that he was disengaged from the two most voluble movements of his generation: critical legal studies and law and economics. It was not that he was hostile; it simply was not what he did. I, in contrast, pursued applied work in law and economics. He was always interested, never disapproving, but it was not something he did himself. Both critical legal studies and law and economics take a stance outside law. For them law is an artifact predetermined by social forces outside of law. For critical legal studies, those forces originate in the distribution of wealth and power; the law is to protect the entrenched against the others. For law and economics, law is an artifact predetermined by the laws of economic production, by an evolutionary process of survival in which the most efficient laws prevail. David was not outside law, he was inside it.

A classifier pausing to place David's work in a niche might group him with the Harvard legal process school of the 1950's. That was, of course, the time and place where he received his legal education and that approach, with its interest in the details of what courts do, had an

† Mary and Daniel Loughran Professor of Law, the University of Virginia.

¹ David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* xiii (Chicago 1985). The colleague was Frank Easterbrook.

impact on him. But David, unlike the legal process school, felt no need to justify his stance. For David, what he was doing simply felt right, and he would persuade others that he was right not by argument but by demonstration: he would do it.

Law is something that people do. People sing, people eat, and people want and have laws. Laws are an important reality of the human condition, and “doing law” is an important aspect of being human. Thus an important part of understanding the human condition is to understand how law is done.

Law is language. Words are the tools that lawyers use to create legal documents, and legal documents matter because their words have meaning. David loved language, whether in the form of a Gilbert and Sullivan ditty, a song, a novel, a statute, or a judicial opinion. He fully understood that language is an imperfect tool with which lovers, artists, and lawyers struggle. But he also understood that imperfection is not the same thing as meaninglessness. He had no use for the argument that because words are often ambiguous the enterprise is flawed. He saw that the challenge, indeed the excitement, of doing law well was using words both to create and extract meaning.

He also understood that law uses language in a particular and a specialized way. Lawyers do not use language to communicate thoughts and feelings to others, they use language to change the social relations between people. When a seller delivers a properly prepared deed to a buyer, there is an actual change in the rights of the two people, both as between themselves and as between them and the rest of the world. Even more dramatic is that relatively rare event when social groups promulgate a document that establishes a framework for the operation of an entire society.

He understood that the process of creating and retrieving meaning from words is a human process, and subject to human frailty and the imperfections of language. But he did not respond to frailty with anger and disapproval. He understood that it was inherent to the human condition, and his instinctive reaction was to laugh, not to condemn.

David understood that he was good at law, and as a faculty member at The University of Chicago he enjoyed a position that enabled him to do law free of the many pressures and demands that affect the work of practicing lawyers. He had no clients to please, no political pressures to take into account, and because his material needs were modest, no pressing economic constraints. He understood that others faced those constraints, but that because he did not it gave him the opportunity to demonstrate what it could mean for someone to do law at the very highest level.

When he came up with the idea of reading the opinions of the United States Supreme Court in chronological order and writing

about it, he discussed the idea with a number of colleagues. I remember thinking that the approach would make for a thin understanding of each case, abstracted from its historical, economic, and social context and dependent on the report of the Court itself. Even David, as I remember, was not very clear about why this was the right project for him. In retrospect, the rightness of the project is evident. The Constitution of the United States was a singularly ambitious legal undertaking. Imagine undertaking to create a written document that would provide a governing framework for a significant part of a vast continent, and which would endure in perpetuity. The Supreme Court has a central role in that project. It was a project born in terrible compromises. The Justices, selected through a necessarily political process, would inevitably have their inadequacies. How did it in fact work out? David, like a music critic, sat down to write a review of a two-hundred-year performance. And because David was a perceptive and informed critic, we—the rest of the audience—learned much.



Larry Kramer†

I try to avoid saying things like, “we’ll never see his kind again.” Every generation says that about their elders, and I seriously doubt the human race has been steadily declining. In this instance, however, I have no choice. Because the platitude is true when it comes to David Currie, who was—if you’ll forgive my piling on still more clichés—a scholar’s scholar, a teacher’s teacher, and an academic’s academic. David was unique, and the simple fact is that we won’t see his like again.

David was my teacher, my colleague, my mentor, my coauthor, a surrogate father figure, and my friend. In each of these roles he reshaped me, like he reshaped so many others. He did so by virtue of his generosity, his straightforward honesty, his utter lack of pretension, and, above all, his fierce and uncompromising integrity. David was the model of what we all strive (or should strive) to be in this profession that is so much more than just a profession. David touched the young men and women he taught; he left a mark on the kinds of lawyers and people they became. And in this way, he left a wonderful and lasting legacy. I hope he knew that.

Countless stories could be told that capture what made David special. For me personally, it may have been the hours and hours he spent with me when I was just starting out as a law professor. I had been assigned (yes, new teachers were assigned courses in those bygone days) to teach Conflict of Laws and Federal Jurisdiction—two subjects that David had taught and in which he had authored leading casebooks. Each day, as I prepared the next day’s class, I came up with what seemed to me to be new ideas about the cases or how to teach them. A few of these ideas might even have been interesting; most, I now see, were either wacky or just plain wrong. But I would run down to David’s office to talk them through. I did this without even thinking about it, maybe nine or ten times a day, often staying for a half hour or more.

David had his own work to do, of course. He had recently decided he should teach the whole first year canon and was working on new courses, as well as just beginning the research for his encyclopedic volumes on the Constitution in the Supreme Court. It must have been incredibly annoying to be constantly interrupted by this inconsiderate (though enthusiastic) young colleague, who wanted only to blab about his own half-baked ideas. Yet David never failed to put down what-

† Richard E. Lang Professor and Dean, Stanford Law School.

ever he was working on and talk things out with me for as long as I wanted. He was never short or impatient, and he never asked me to come back later. He made me feel as if helping me was the most important thing he had to do at that moment. So self-absorbed was I, that at the time I failed to realize how extraordinary this was. Even with David's example, I have never been this generous. Nor has anyone else I know.

I could easily tell stories like this ten times over. But rather than that, I want to talk about David as a teacher. Because, with time, I have come to understand something that I think David always knew: as much as we enjoy working on scholarship, and as important as it can be, it is our role as teacher that matters most. Among the rewarding parts of being a dean is the privilege to hear the stories law school graduates tell: stories about how this or that professor changed their lives; stories about how we shaped their thinking; stories about how we helped their careers or helped them through personal crises, helped them find spouses or helped them make sense of the world, or just plain helped them. Our students leave us and grow up. They become our peers or surpass us in accomplishments. But the time they spent with us at the beginning, when they were just starting to find themselves—still choosing the values by which to lead their lives and deciding which personality feels most comfortable—remains among their most important and indelible experiences.

I took two classes from David in law school: Constitutional Law I and Federal Jurisdiction. Both were revelatory: my first and best introduction to what it actually means to be rigorous. David showed us how law could be incredibly complicated and yet also completely commonsensical. He showed us what it meant to construct a whole legal argument. He was unrivaled in the classroom.

People who reflect on David's teaching usually focus on the antics he used to lighten things up. David wore costumes and sometimes broke into tune. He might stomp up and down to make a point. He did all sorts of things I've never had the daring to do myself because gambling around would seem false or silly coming from me. But David had tremendous charisma in front an audience (no surprise given his undeniable talent as an actor and singer, though not what one might expect given how soft-spoken he was in private), and he used it to dramatic effect to engage students.

Yet this is not the quality that made David such a great teacher. What made David great was the substance of his classes. More so than any other teacher, David understood what it meant to teach students to "think like lawyers," and he put us through the paces to hammer the lesson home. Every day was a workout. Literally. My Federal Jurisdiction class was relatively small, maybe twenty-five students, and it

met in Classroom II—the law school’s largest room, designed for classes of 180. Yet more than once, a student in the class that followed ours noted with amazement how after Fed Jur the room was sticky and humid, like a gymnasium or a locker room.

No one could get a whole class engaged in argument like David. I remember sessions in which he let us—or led us to—develop a line of argument for fifty or fifty-five of the sixty-five minute session, only to reveal with ten minutes left that our whole analysis was flawed. The last ten minutes became a frantic race to unravel everything we had done and to construct a new line of reasoning that made more sense. We could do this because David had in fact been fully in control the whole time, and the points he had skillfully helped us articulate in connection with an unworkable line of argument could be reassembled into something better. No wonder the room reeked of sweat.

David’s classes were exhilarating, and they have remained with me ever since. I sometimes wondered whether I had made it all up, whether David really was as good as memory made him. So I sat in on a class during my tenth law school reunion. I had, by that time, left Chicago for Michigan and become a seasoned teacher with eight years under my belt. I knew how to construct a class and keep it moving, and I understood how easy many things were that had seemed mysterious and impressive to me as a student. I sat in the back of the room with some of my former classmates. David was teaching Conflict of Laws, the subject I knew best (in part because I was now a coauthor on David’s casebook). I recalled similar visits from alumni when I was a student: recalled looking at them in the back of the room, wondering who those old people were. It was dismaying and a little sad to realize that my former classmates and I were now the old people. But I sat back smugly, expecting to see a class not unlike my own.

I was wrong. Though I knew the material, I found myself mesmerized, as I always had been by David’s teaching. It was a lesson in what it meant to be a truly great teacher. I left the class in wonder, thrilled to recapture a moment of my youth but put in place by the realization that, no matter how hard I worked, I could never match David.

None of us can. It was a singular privilege to study law with David Currie. We’ll not see his like again.



David Currie's passing seems to mark the end of an era at The University of Chicago Law School. But what era, exactly? The Currie era can be defined with some circularity by noting that nearly all those giants whose portraits adorn the main floor of our Law School have now passed away. Alternatively, we might say that everyone who taught at Chicago in 1968 is now either deceased or retired, but David's own retirement a short time ago made that so. When an important colleague retires, it seems inappropriate either to mourn or to celebrate. We use the occasion to express gratitude and to reflect on the work of a career, even as we hope that there will be many years of productivity in (nominal) retirement. In the case of Professor Currie, he and we were cheated out of this retirement. He continued to teach and work at The Law School, to be sure, but the remarks delivered upon his retirement, and at the unveiling of his portrait in our classroom wing, now seem like farewells.

Observations regarding demise do not help us understand the character or value of what is gone—or what remains. We want to capture the distinct quality of a generation, and of David Currie, in particular. Viewed from the perspective of successors, it is usually the case that distinguished predecessors seem firmer in their standards than do those who follow. I might describe the current generation of Chicago faculty as productive, imaginative, versatile, brilliant, ambitious, and always interesting. Some of these adjectives come to mind in describing the Currie generation, if there is such a thing, but that generation would also surely be described as principled, unwavering, and strong-willed. My contemporaries think of excellence as coming in many forms and as produced in many styles. But David Currie and his earlier set of colleagues had much stronger views regarding the ingredients necessary for a good day at work or a good class. Some are humorous, but perhaps nevertheless revealing. David wore a tie and thought others should too. David thought that good lunch conversations required that one be seated and that lunch be served. He was a member of the Constitution Generation at Chicago. Members of that generation carried around the US Constitution in their inside jacket pockets; most had notes in the margins. By 1985, a majority of the faculty would have found it somewhat humorous or ironic to whip out a

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copy of the Constitution during a meal. By 1995, most topics of faculty discussion would have required knowledge of some other country's laws or would have been about human behavior or economics, rather than about a beloved text. By 2005, most faculty would have appeared at lunch, and certainly at dinner gatherings, without a jacket.

David, however, liked the old texts. He never tired of asking prospective faculty members about the Rules of Decision Act—and he continued to see new things in their replies and in the ensuing discussions. I recall a law school classmate, in 1980, describing a Chicago interview in which Professor Currie grilled him about this important statute. Twenty years later an applicant again confided in me that an interview in Currie's office had gone well because the applicant had been warned of the likelihood of such a question at Chicago. Those of us who went to Yale had not, of course, met the Act during three years of law school, except as something found in *Erie Railroad Co v Tompkins*, a case taught to us in one class and by someone who had spent most of his career at Chicago. In the normal course of events, no one at Yale would ever have mentioned the Rules of Decision Act, or perhaps any other statute! It was the threat of an interview with David Currie in Chicago that kept that Act alive in New Haven.

There were times, I admit, when I thought David more inflexible than traditional or principled. For example, he thought the first-year curriculum at our Law School was close to perfect, and he had no patience for my wanting to experiment with it, whether by introducing intellectual property into it, globalizing it, or even injecting it with more parsing of statutes. His memos on the subject of curricular reform were direct and witty, except that I began to see that he did not find the subject amusing at all. Nor did he like new casebooks. Someone would suggest a book to him and he would tell the author that he preferred the predecessor book, with shorter and older cases, and with traditional themes. I have learned that this preference for tradition and authenticity extended to films. A movie that took liberties with the historical record or with the book on which it was based would cause Currian displeasure. The idea that a modern twist on an old story might inspire some viewers to go read the original was never enough to justify the novelty.

I have often recalled (in and out of David's presence) one of our first encounters. Just after I joined the faculty, David came by my office to invite me to walk over to lunch. I was on the telephone with a prospective student, having previously suggested to the Admissions Dean that it would be a good idea to ask several faculty to call some of the very best applicants, in order to entice them to Chicago. Such calls might signal our accessibility and our interest in ideas, and it might also show that we cared about students. I was given the files of

four or five applicants, and I called them, making conversation about subject areas indicated in their applications. When David came to my door, I was completing one such phone call. He asked me what that had been all about. I described the recruiting plan, and commented on how well this had worked at my previous law school, and how I thought the just-concluded conversation had gone. David looked at me with incredulity and said, “But we don’t want every student at Chicago. If they are not smart enough and well-informed to know that this is the best place, then we should not try to get them here.” No academic wants to say that he or she thinks that a great University needs to invest in marketing, but I suspect that David’s belief that the good and pure will win out without any advertising or advocacy is part of what we admire, but decline to follow, in that earlier generation.

I hope that none of these quick descriptions makes David seem wrong or inflexible. I came to learn that he was principled and more often right than not. It was, as I now see it, simply the job of the newcomers to suggest change, and the job of the old guard to resist change and to place the burden of proof on those who would do things differently.

When I became Dean, my relationship with David changed a bit. For one thing, he felt it his duty to report to me. Every so often I would receive a note or call informing me that he would be missing several days at work because he would be on a family vacation. To this day, I am puzzled by these regular reports. Could he have thought that other colleagues also reported every missed day at work? It must have been the case that when he served The Law School as Interim Dean he noticed that not a single other faculty member reported planned absences. I suspect that he simply thought that in a well-run workplace everyone ought to be accountable, and that if the rest of us were not up to his standards, that hardly excused him from correct behavior.

David was an incurable romantic, with respect to both The Law School and his marvelous spouse, Barbara Flynn Currie. Just as he never seemed to think that scholarship written at another law school could hold a candle to work done here, or that students trained elsewhere could be a match for those whom we had graduated, so too he did not think that the institution of marriage could be flawed in any way. Barbara was simply the answer to all his life’s dreams, as it ought to have been. Who can forget notable Currie-isms on this score such as: “Do I believe in in marriage? I have seen it with my own eyes!” and “Here’s to Barbara—wife, mother, and management, all rolled into one.” I think this was much more than old-fashioned rhetoric or taste. David’s eyes would twinkle as he said nice things about Barbara or reported on their trips together, very much as they would twinkle when he quoted a relevant line from an opera or when he knew he had a winning legal argument. We are fortunate that Barbara remains

in our Law School family. Still, we have lost not only a great colleague and teacher, but a great partnership.

I like to think that we have inherited most of the great characteristics of our lost friend. As a faculty we will surely combine to maintain The Law School as he estimated it to be. Indeed, we should not think of David's passing as marking the end of an era—because the era marked by great teaching and serious scholarship, as well as some old-fashioned values—has hardly ended. David was often excited about new areas of law; he taught around the first-year curriculum and made important forays into Environmental Law and Comparative Law. Our experienced faculty do the same, and our young faculty can be counted on to follow this pattern. If the Constitution Generation was remarkable for its love of teaching and its careful analysis and writing, then that generation is very much an ongoing one here. Nor would I be surprised if a junior colleague stood up one day soon, as David did from time to time, in order to cast doubt on the appointment of an interdisciplinary scholar with demonstrated indifference to the teaching of law, by saying, "For Heaven's sake, we are supposed to be a *law school*." There was something about the way he emphasized each of those words, putting roughly the same force behind each in consecutive fashion, that spoke volumes about who we are and what he was. I will miss the force behind those words, but that sentiment will also be carried forward.

Finally, we will all miss David Currie's scholarship, not to mention his amazing ability to produce original and interesting work year after year, through thick and thin. You would pick up his latest work and be surprised at how quickly he could interest you in constitutional history, German and American alike. He was serious but also witty. He could tease his colleagues about their taste for social science in law, and for objective measures of productivity, even as he taught you something about early constitutional law. I refer here to one of his most influential works, *The Most Insignificant Justice: A Preliminary Inquiry*.¹ Part of the fun of this piece is its irony. For the right word with which to describe its author is not traditional, old-fashioned, or principled. It is significant. Farewell, David Currie, our Most Significant friend.

¹ 50 U Chi L Rev 466 (1983).

George A. Ranney†

Most of us are celebrating David's life and his accomplishments as a professor of law, teacher, and scholar, as a father, and as a husband who has enabled Barbara to do so much with her life—and enabled both of them to enjoy a rich life together. I have a sense of all of this as one of his first students at The Law School, as a friend, and as an admirer of all that he accomplished. I want to talk this morning about something quite different, something that combines roles I've mentioned—as a teacher and scholar who became a maker of policy, and as a man of action who could and did develop ideas in the academic world and then put them into practice as policies that we still live by today.

I am talking about the years that David worked with great success and impact in state government to improve the quality of the environment in Illinois.

In 1969, I was working in the Illinois Budget Office for Governor Richard Ogilvie when the Governor decided that it was time to address environmental issues at the state level. This would be one of the first such initiatives in the country and there was little to guide us. There was no federal environmental program at the time and there were very few recognized experts in this field. The Governor decided that we needed a person who could approach these issues as a student himself and master the field, someone who would do so with objectivity, institutional sensitivity, and some sense of the complexity involved in dealing with many levels of government and competing policy principles of economic development and environmental quality.

David Currie had been my professor in Conflict of Laws. His course was an intellectual delight. In it we explored the challenges of laws imposing conflicting water quality standards for Illinois and neighboring states. So I happened to know that David met the intellectual qualifications for the path-breaking policy work we had laid out. I was asked to see if he would be willing to serve as our intellectual point person.

David immediately agreed to help. Initial meetings in our house on Woodlawn Avenue led to David's taking full responsibility for defining the state's response to environmental challenges. His work over the next four years became one of Governor Ogilvie's most prominent legacies.

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He researched and compared responses to environmental challenges by the federal government and states across the country. Through his scholarship he understood that in the area of environmental protection it was important to have an investigative and prosecutorial function, which was what many activists at the time were calling for. But he also understood it was essential to have a fair and independent adjudicatory capacity, with sufficient expertise in a highly technical and developing field such as this to decide with impartiality tough questions with their many legal, conceptual, economic, and scientific issues. Probably most importantly for the early days of this movement, he saw the importance of research, of gathering more information in the most expert, scholarly, and impartial fashion. He proposed to the Governor that there be a tripartite system of agencies: the Environmental Protection Agency, the Pollution Control Board, and finally the Illinois Institute for Environmental Quality. This is the system that has basically served the state well since that time, with the Institute evolving into the Department of Energy and Natural Resources. It became a system that has been emulated elsewhere across the nation.

So successfully did David present these ideas and master the substantive issues they reflected that the legislation he drafted was promptly passed. It was then a natural progression for David to serve as the first chairman of the Pollution Control Board. There he—and his opinions—provided the leadership and precedents for the entire state as it implemented the recommendations inherent in this new system of environmental regulation, adjudication, and research.

This was David's huge contribution to the people of this state. I have heard some of the most senior leaders in the environmental community speak with respect, admiration, and gratitude for his contribution. I share those opinions. But I want to add an additional reason for my respect. David showed us how a scholar of distinction and capacity can take his skills and use them in the complex, difficult, sometimes unpleasant, and always real world of public policy. We all, Barbara foremost amongst us, know how difficult it is to provide effective leadership in that world. David did this, showing us how public policy for one of the most controversial issues of the day can be researched, conceptualized, legislated, and implemented. He did it with a distinction that should be inspirational to all of us.

Geoffrey R. Stone†

David Currie came of age in the law in the era that followed World War II and preceded the turbulent 1960s. He attended college at The University of Chicago, excelled at the Harvard Law School, served as a law clerk to Justice Felix Frankfurter, and immediately joined the faculty of The University of Chicago Law School, where his distinguished father, Brainerd Currie, had taught Conflicts of Law (among other subjects) for a decade. These were the years of the Cold War and “the man in the gray flannel suit.” David emerged from the depths of the “Silent Generation.”

And emerge he did. I never saw David wear a gray flannel suit and I *never* knew him to be silent. He was not ever a conformist. He was bold, opinionated, principled, funny, courageous, independent, and flamboyant. He was, in every way, his own man. Everyone knows that David was a brilliant scholar and a truly extraordinary teacher, but not everyone knows that he was not at all an organization man. He could be a good citizen, who would graciously take on institutional responsibilities when asked (nicely), but he rarely if ever raised his hand. He was much more interested in ideas and teaching his classes.

In 1991, University President Hanna Gray taught me an important lesson. I was then Dean of The University of Chicago Law School. Walter Blum, who had held the Edward H. Levi Distinguished Service Professorship, had just retired, and it fell to me to nominate someone for what I regarded as the most prestigious professorship The University of Chicago had to offer.

I asked President Gray to lunch and with some trepidation proposed David Currie for the appointment. Why was I filled with trepidation? I had to admit to President Gray that although David was “a brilliant scholar and a truly extraordinary teacher,” he wasn’t much of a committee man. “Is this a problem,” I asked, “in light of the fact that the Levi chair is a ‘Distinguished *Service*’ professorship?” A bemused President Gray replied, “What makes you think scholarship and teaching aren’t service?”

I first met David Currie almost forty years ago, when I was a student at The Law School. In the spring of 1970, I enrolled in his course

† Harry Kalven, Jr., Distinguished Service Professor of Law, The University of Chicago. After he wrote this essay, the Board of Trustees of The University of Chicago appointed Geoffrey R. Stone to be David Currie’s successor as the Edward H. Levi Distinguished Service Professor of Law.

on Conflicts of Law, a course he had taken over from his father. David was already reputed to be one of the great teachers of his generation, so I looked forward to the course with great anticipation. Alas, it was a bust. David had recently completed his casebook in Conflict of Laws, and he decided that the book contained virtually everything he had to say on the subject.

Thus, rather than teach the course in his usual Socratic manner, he decided to embark upon an experiment. He would assign the class certain chapters each week, and then he would appear one day each week to answer our questions about the material. To the best of my knowledge, David never repeated this experiment, and with good reason. When all was said and done, the students' questions weren't particularly insightful or illuminating.

I had to wait almost twenty years before I finally had the pleasure of witnessing first hand what everyone had raved about for so long—a *real* David Currie course. By this time, I'd been David's colleague on the faculty for a dozen years. I had just completed a draft of my own casebook in Constitutional Law. David magnanimously offered to take it for a "test drive." He volunteered to teach the First Amendment course that year out of the mimeographed materials. This was an incredibly generous offer and one that proved invaluable to me. Not only did it allow me to see how someone else (who just happened to be a great teacher) would use the material, and therefore enable me to revise it accordingly, but it also gave me the opportunity to sit through an entire David Currie course.

As the many thousands of students who have had this experience in their lifetime will surely attest, it was a mind-bending experience. David was, quite simply, the most gifted teacher I have ever seen. The combination of intense curiosity, intellectual rigor, and a natural flair for the dramatic made every class an adventure . . . and a performance. Ever since, this experience has made me feel inadequate as a teacher. (But I take some consolation in the knowledge that it would make *anyone* feel inadequate as a teacher.)

Throughout my career, David was my teacher, colleague, friend, mentor, inquisitor, therapist, and advisor. Early in my time on the faculty, I had some personal problems. David kindly took me under his wing. I recall fondly that he invited me to join him for an afternoon on his sailboat. He casually remarked how strange it was that as faculty colleagues we spent so much time together, but knew so little about one another personally. So, on that day, we talked about ourselves, our families, our lives. It was, for me, a remarkable, a memorable, and a moving day.

Years later, when I was Dean of The Law School, David stopped by my office and sought my "advice." He asked whether I thought it would be crazy for him to undertake a project in which he would read

every Supreme Court case ever decided and then write a commentary on the entire corpus of the Court's work from the very beginning. I was flattered and pleased that he'd asked my opinion. I told him that it was, indeed, "crazy," but it was also possibly brilliant, and that I would support him in any way I could. The rest is history (so to speak). It was a truly idiosyncratic idea on a scale and of an ambition that only David would—or could—have undertaken.

Because David was not a "committee man," he rarely took strong positions on faculty appointments. But occasionally he did. I recall two such instances. In one, the faculty had voted against an appointment. David circulated a memo stating that we were wrong and offering his reasons. The next week, we unanimously reversed course. Many years later, when the faculty was considering another appointment, David circulated a memo stating that the candidate did not merit an appointment. He was right, and we abandoned the idea. In my more than thirty years on the faculty, no other colleague has ever had such a definitive impact on the views of his colleagues. David had integrity, and everyone knew it. We *all* trusted him, always.

In his later years, it was often painful to see David as he hobbled into The Law School. But it was inspiring as well. He never complained. He was always chipper. The students admired him with affection unmatched in my experience at The Law School. And the faculty, to a person, held him in awe. With his sense of humor, self-discipline, intellectual honesty, and simple decency, he was, truly, a *very* great man. We all shall miss him.



As a child, David Currie immersed himself in the patter and wit of W.S. Gilbert and what he considered to be the beautiful music of Sir Arthur Sullivan. He loved the fanciful topsy-turvy world of these collaborators that ended invariably in logical conclusions. He once told me that by age seven he had memorized “When you’re lying awake with a dismal headache.” This is truly remarkable, considering that *Iolanthe*’s Lord Chancellor’s tale is the most challenging of all patter songs in the G&S repertoire. But that doesn’t surprise you, does it? We all know of his superior memory.

The Gilbert and Sullivan Opera Company of Chicago benefited immeasurably from the talents and contributions of David Currie. In 1962, two years after the organization of the company, David auditioned and was first cast in the ensemble of *HMS Pinafore* and then as a juror in *Trial by Jury*. One year later, he made his principal debut as Old Adam in the company’s production of *Ruddigore*. He went on to play leading roles in thirteen productions and then changed hats by becoming the company’s longest running stage director at the helm of twenty productions. When David had to take a two-year hiatus from directing in 1966–1967, his wife Barbara assumed the role of producer. David’s involvement has been constant ever since.

David had every role of the repertoire memorized. He could step in at a moment’s notice and assume any role in any production. We often joked he only needed Barbara’s high heels and there would be no need for understudies at all. Poo Bah in *The Mikado*, in *The Sorcerer*, he was the sorcerer, the Major General in *The Pirates of Penzance*, *Patience*’s Bunthorne, *Iolanthe*’s Lord Chancellor, as well as Old Adam in *Ruddigore*. He was most proud of his portrayal of the judge in *Trial by Jury*, a concert version staged here at The Law School with Judge Currie presiding over the production. It played to a sellout crowd. He was magnificent. His authoritative understanding of the genre continues to remain a guiding light in the direction of all productions of the company.

His skill and understanding of language became more and more an asset to the company as he coached diction for all the principal roles. Among our most treasured memories are the hours spent alongside David, hearing him coach inflection, dialect, and details of diction,

† Instructor, Loyola University Chicago; Conductor, Gilbert and Sullivan Opera Company of Chicago (*Grand Duke*, *Ivanhoe*, *Trial by Jury*).

and demonstrating carefully crafted cockney or lightly articulated upper class Oxford. That was David's gift to us all. He found the beauty and heart in every phrase. He never mocked or overstated with melodrama. His brand of gentle sentimentality was real. This approach is the hallmark of our company; none could demonstrate it better. David attached simplicity and elegance to the works of Gilbert and Sullivan and that's what sets us apart from other companies.

He could show tenderness, haughtiness, indignation and absent-minded confusion when the role called for it. It was always touching to hear him recite a love scene as he assumed both characters involved.

He knew the importance of pause and silence, and in general held a firm grasp on the subject of pacing. Of course this meant that he had to understand musical line and phrase, rise and fall, "form and figure," and how they intermingle together with the intricacies of the stage.

There were scores of fine professional singers who had the opportunity to work with David and carry those skills over to their ensuing careers. Developing talent is a great skill, and, as a master teacher, David knew well how to recognize talent and nurture it.

My husband Michael Swisher has performed leading roles in eighteen productions of the company. Michael is a talented singer, but his dialect needed lots of attention. David would spend hours with him, coaching pacing and nuance of lines. Michael relates, "David always seemed to know what we were capable of even when we didn't know it ourselves." He will be forever grateful to David for that.

David also enjoyed the art of casting, an area in which he took great pride. Being able to understand a dimension of a character and match it with a personality (and talent) was another of his tremendous gifts.

When David Currie thinks you're special—somehow because it is someone who you admire so much—it makes it so. You find a way to rise to his expectation. It certainly changed me.

This March, when the house lights dim and the curtain rises on the Gilbert and Sullivan Opera Company's forty-ninth annual production, our sixth production of *Iolanthe*, many of us will privately visualize the nimble steps and impish smile of a Lord Chancellor wearing a long stocking cap and a dressing gown, bare feet in scuff slippers, and holding a candlestick, whose voice could be heard at the back of the hall and whose charm and wit captured the hearts of the actors, production crews, orchestra members, audiences, and countless others who loved and admired the unforgettable and irreplaceable David Currie.